IN THE COURT OF APPEAL OF TANZANIA

AT DODOMA

(CORAM: MWARIJA, J.A., KEREFU, J.A., And ISMAIL, J.A.)

CRIMINAL APPEAL NO. 651 OF 2021

MATIBYA NG'HABI.....APPELLANT

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the Decision of the Resident Magistrate's Court of Dodoma, at Dodoma)

(Dudu, PRM-Ext. Jur.)

dated the 24th day of November, 2021
in
Extended Jurisdiction Criminal Appeal No. 15 of 2021

JUDGMENT OF THE COURT

7th & 14th February, 2024

KEREFU, J.A.:

MATIBYA NG'HABI, the appellant, is currently serving a term of thirty (30) years' imprisonment following his conviction by the District Court of Mpwapwa at Mpwapwa of the offence of impregnating a secondary school girl contrary to section 60A (3) of the Education Act, Cap. 353, as amended by section 22 of the Written Laws (Miscellaneous Amendment) (No.2) Act No. 4 of 2016 (the Education Act). It was alleged that, on diverse dates of February, 2020 at different time and hours at Pwaga Village within

Mpwapwa District in Dodoma Region, the appellant unlawfully impregnated one AGS, a girl aged eighteen (18) years who was a student at Pwaga Secondary School.

The appellant denied the charge and therefore, the case had to proceed to a full trial. To establish its case, the prosecution called a total of six witnesses and tendered three documentary exhibits namely, the Police Form No. 3 (exhibit P1), the clinic card (exhibit P2) and the appellant's statement (exhibit P3). On his side, the appellant testified alone, as he did not summon any witness.

In a nutshell, the prosecution case as obtained from the record of appeal, indicates that, the victim, who testified as PW1 (name withheld) stated that she was a Form IV student at Pwaga Secondary School but stopped going to school after she discovered that she was pregnant. That, the appellant was responsible for the said pregnancy because she had intimate relationship with him and in February, 2020, they had sexual intercourse twice at the residence of her sister one Editha Selingo. Having realized that she was pregnant, she decided to run away from home and went to live with the appellant at Kilosa in his rented house as he had promised to marry her. It was her further testimony that, they were later

arrested and taken to Mpwapwa Police Station. That, she went to Mpwapwa District Hospital for medical examination after she had obtained a PF3. Upon examination, it was revealed that she was six months' pregnant thus, she started to attend clinic. The PF3 and the clinic card were admitted in evidence as exhibits P1 and P2 respectively.

PW1's account was supported by her father, Gaitan Sallenge (PW2), Jonson Nickson Tuiya (PW3), Agness Salingo (PW4) and Jailos Gilbert (PW5). PW2 added that, on 23rd May, 2020, his daughter, PW1 ran away from home and went to Kilosa. He reported the matter to Sima Josiah Mtembai (PW6), the Ward Executive Officer who advised him to report the matter to Kibakwe Police Station. A moment later, they were informed that PW1 and the appellant were arrested in Kilosa and brought to Pwaga Village office.

On his part, PW6 testified that, on 27th May, 2020, PW4 reported the matter to his office and he prepared a warrant of arrest and sent two militiamen to Kilosa to arrest them. The appellant was brought to his office and upon interrogation, he confessed to have committed the offence. It was the further testimony of PW6 that, he asked him to write his confession on a piece of paper. The said statement was admitted in evidence as exhibit P3. PW5 confirmed that, on 27th May, 2020 he was sent

to Kilosa to arrest the appellant and PW1 and brought them to Pwaga Village office.

PW3, testified that he was the Headmaster of Pwaga Secondary School where PW1 was a Form IV student. That, when the school was opened after its closure following Covid-19 pandemic they were informed that PW1 was pregnant.

In his defence, the appellant distanced himself from the accusations levelled against him. He testified that he was arrested on 27th May, 2020 by militiamen of Pwaga Village on allegation that he impregnated a schoolgirl and taken to Pwaga Village Office. He contended that, he was not responsible for the alleged pregnancy and denied to have known PW1 before and having any relationship with her. He thus disowned exhibit P3 and challenged the evidence of PW6 that he gave an untrue story before the trial court. He also denied to have been taken to police.

Having heard the evidence of both sides, the learned trial Resident Magistrate was convinced that the prosecution had proved the case against the appellant to the required standard. Thus, the appellant was found guilty, convicted and sentenced as indicated above.

The appellant's first appeal was unsuccessful, as the learned Principal Resident Magistrate with Extended Jurisdiction dismissed it and upheld the

decision of the trial court. Undaunted and still protesting his innocence, he has now appealed to this Court. In the memorandum of appeal, he raised seven grounds of appeal. However, for reasons to be apparent in due course, we shall not reproduce the said grounds herein.

At the hearing before us, the appellant was fending for himself, whereas the respondent Republic was represented by Ms. Beatrice Nsana, learned Principal State Attorney assisted by Ms. Rachel Tulli, learned State Attorney.

When prompted by the Court, on the approach he would prefer in arguing his grounds of appeal, the appellant opted to let the learned State Attorneys respond first but he reserved his right to rejoin, if the need to do so would arise.

At first, Ms. Tulli declared her stance of opposing the appeal. However, upon further reflection, she abandoned that track and informed the Court that she was supporting the appeal. She based her new stance on the first and second grounds of appeal, which are to the effect that the prosecution case was not proved beyond reasonable doubt.

She argued that, to prove the offence the appellant was charged with, the prosecution was required to prove beyond reasonable

doubts that, (i) PW1 was impregnated while she was a secondary school student, and (ii) that, she was impregnated by the appellant.

Arguing in support of the first and second grounds of appeal, Ms. Tulli submitted that, in their evidence, although, PW1 and PW3 testified that PW1 was a Form IV student at Pwaga Secondary School, they did not tender any documentary evidence, such as, a student identity card, a school register or classroom attendance register to prove PW1's enrollment and her attendance in that school. She argued further that, apart from introducing himself that he was the Headmaster of Pwaga Secondary School, PW3 did not substantiate his evidence with any tangible evidence to prove that fact. It was her argument that, since there was no any documentary evidence produced by the prosecution witnesses to prove that PW1 was among the Form IV students at Pwaga Secondary School and that she stopped going to school after she was impregnated, the case was not proved to the required standard. That, the said omission raises doubts that would have been determined in favour of the appellant. She thus faulted the first appellate court for sustaining the appellant's conviction and sentence, while the charge against him was not proved to the hilt. To support her proposition, she referred us to the case of **Maneno Matibwa Francis @ Babio v. Republic**, Criminal Appeal No. 35 of 2021

[2023] TZCA 78: [1 March 2023: TanzLII]. Based on her submission, she urged us to allow the appeal, quash the conviction, set aside the sentence imposed on the appellant and set him at liberty.

In a brief rejoinder, the appellant welcomed the stance taken by Ms. Tulli to support the appeal and also urged us to allow his appeal and set him free.

Having carefully considered the record of appeal and the submissions made by the parties in the light of the first and second grounds of appeal, it is clear to us that they are all at one that it was improper for the first appellate court to sustain the appellant's conviction and sentence, while the charge against him was not proved to the required standard. We respectfully, share similar views and we shall demonstrate.

However, before doing so, we wish to state that, we are not losing sight that, this being the second appeal, under normal circumstances, we would not interfere with concurrent findings of the lower courts if there are no mis-directions or non-directions on evidence. However, where there are mis-directions or non-directions on the evidence, the Court is entitled to interfere and look at the evidence in view of making its own findings. See for example **Director of Public Prosecutions v. Jaffari Mfaume**

Kawawa, [1981] TLR 149, **Salum Mhando v. Republic,** [1993] TLR 170 and **Mussa Mwaikunda v. The Republic**, [2006] TLR 387.

At the outset, it is instructive to state that, this being a criminal case, the burden lies on the prosecution to establish the guilt of appellant beyond reasonable doubt. In **Woodmington v. DPP** [1935] AC 462, it was held inter alia that, it is a duty of the prosecution to prove the case and the standard of proof is beyond reasonable doubt. The term beyond reasonable doubt is not statutorily defined but case laws have defined it. For instance, in the case of **Magendo Paul & Another v. Republic** [1993] T.L.R. 219 the Court held that:

> *"For a case to be taken to have been proved beyond reasonable doubt its evidence must be strong against the accused person as to leave a remote possibility in his favour which can easily be dismissed."*

It is noteworthy that, the duty and standard of the prosecution to prove the case beyond reasonable doubt is universal in all criminal trials and the duty never shifts to the accused.

In the instant appeal, it is evident at page 1 of the record of appeal that the appellant was charged with the offence of impregnating a

secondary school girl contrary to section 60A (3) of the Education Act. The said section provides that:

> *"Any person who impregnates a primary school or a secondary school girl commits an offence and shall, on conviction, be liable to imprisonment for a term of thirty years."*

It is trite law that, for the prosecution to establish the above offence, it has to prove beyond reasonable doubts two ingredients; **one**, that, the girl was impregnated while she was a primary or secondary school student; and **two,** the school girl was impregnated by the accused person.

Therefore, in the instant appeal, as correctly submitted by Ms. Tulli, for the prosecution to establish the charge against the appellant, it was required to prove beyond reasonable doubts that, PW1 was a secondary school student at the material time and was impregnated by the appellant.

Having revisited the evidence of PW1 and PW3 found at pages 10 to 12 and 14 to 15 of the record of appeal respectively, we agree with Ms. Tulli that the said witnesses were unreliable witnesses and thus their testimonies did not prove the above ingredients. That, apart from stating that she was a Form IV student at Pwaga Secondary School, PW1 did not tender any documentary evidence, such as, her student identity card to

prove that fact. Worse enough, apart from introducing himself as the school headmaster of Pwaga Secondary school, PW3 did not support his evidence by any documentary evidence like his employment identity card and a student's register book to prove PW1's enrollment and her attendance in that school. It is our considered view that, the said register could have assisted the trial court to ascertain the allegation that PW1 was a student in that school and, when she was impregnated, she was still a student.

It is our further view that, since there was no any explanation as to why the said documents were not tendered in evidence, the trial court is entitled to draw an adverse inference against the prosecution which would have been resolved in the favour of the appellant. Earlier on, the Court had made corresponding observations in the cases of **Peter Bugumba @ Cherehani v. Republic**, Criminal Appeal No. 251 of 2019 [2023] TZCA 221: [4 May 2023: TanzLII], **Salum Nicholaus Mnyumali v. Republic**, Criminal Appeal No. 327 of 2020 [2023] TZCA 17968: [14 December 2023: TanzLII] and **Maneno Matibwa Francis @ Babio** (supra). In the latter case, when considering a similar matter, we emphasized that:

> *"...we find that evidence of the teacher or school register was relevant in establishing that PW7 was a student at the*

time she was impregnated. Since there is no any other explanation why the register book was not tendered in evidence and failure to parade as witness a teacher from Makongo Secondary School who was within reach entitles us to draw an adverse inference and should be in the benefit of the appellant."

We are mindful of the fact that, in the current appeal, PW3 introduced himself as the Headmaster of Pwaga Secondary School, but since he made bare assertion without any substantiation, the omission created doubts on his evidence which should have been resolved in the benefit of the appellant.

In the circumstances, we are satisfied that there is no cogent evidence on record which could have been safely relied upon by the trial court and the first appellate court to convict the appellant. It is our further view that had the first appellate court considered the issues discussed above, it would have come to an inevitable finding that it was not safe to sustain the appellant's conviction. Since our finding in the first and second grounds disposes of the appeal, we, accordingly, see no compelling reasons to consider the remaining grounds of appeal.

Consequently, we find merit in the appeal and allow it. Accordingly, we quash the appellant's conviction and set aside the sentence imposed on

him. We order that the appellant be released from custody forthwith unless he is otherwise lawfully held.

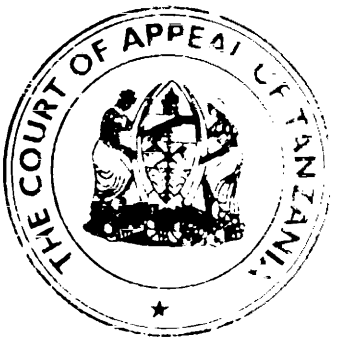
DATED at **DODOMA** this 12th day of February, 2024.

A. G. MWARIJA
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

M. K. ISMAIL
JUSTICE OF APPEAL

The Judgment delivered this 14th day of February, 2024 in the presence of Appellant appeared in person and Ms. Neema Taji, learned State Attorney for the respondent / Republic, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL